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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

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9 Terrance Ardell Phillips,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.

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15 **No. CV-17-08094-PCT-DLR (DKD)**

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17 **REPORT AND RECOMMENDATION**

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23 **TO THE HONORABLE DOUGLAS L. RAYES, U.S. DISTRICT JUDGE:**

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25 Terrance Ardell Phillips filed a Petition for Writ of Habeas Corpus (“Petition”) in

26 May 2017, challenging his conviction in Coconino County Superior Court for one count

27 of first degree murder for the death of Michael Minix, and his sentence of natural life.

28 His Petition alleges ineffective assistance of counsel during the plea bargaining process

29 and vindictive prosecution. Respondents argue that his Petition is untimely and that he is

30 not entitled to equitable tolling. As detailed below, the Court recommends that Phillips’

31 Petition be denied and dismissed with prejudice.

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33 **BACKGROUND**

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35 **A. Guilty Plea**

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37 In April 2005, the Coconino County Superior Court conducted a change of plea

38 hearing where Phillips entered a plea of guilty to first degree murder. (Doc. 11, Exs. C,

39 D) During the hearing, the Court discussed all of the various rights Phillips was giving

40 up and Phillips indicated he understood. (Doc. 11, Ex. GG at 5-6) The Court also

1 explained that under the plea agreement, the Court would determine any aggravating and
2 mitigating factors. (Doc. 11, Ex. GG at 6-9) The Court accepted the plea after finding
3 that Phillips “knowingly, intelligently, and voluntarily entered a plea of guilty to the
4 charge in the plea agreement,” and that there was a sufficient factual basis. (Doc. 11, Ex.
5 GG at 19)

6 Subsequently, the Court held a four day aggravation/mitigation hearing. (Doc. 11,
7 Ex. F) Phillips, through counsel, called ten witnesses to testify and presented oral
8 argument to the Court. Phillips also presented statements to the Court; the State called
9 witnesses and presented oral argument as well. (Doc. 11, Exs. F, II) In November 2005,
10 the Court found several aggravating and mitigating factors and sentenced Phillips to
11 natural life. (Doc 11, Ex. G)

12 **B. First Rule 32 Petition**

13 Phillips, through counsel, timely filed a Petition for Post-Conviction Relief (“First
14 PCR”) in September 2006, in Coconino County Superior Court. (Doc. 11, Ex. H) The
15 First PCR raised three claims of ineffective assistance of counsel relating to his
16 representation during the aggravation/mitigation hearing. Phillips argued that he received
17 ineffective assistance of trial counsel because they failed to present evidence relating to
18 his mental illness, expert testimony was presented telephonically not live in court, and
19 they did not obtain a defense expert to rebut the State’s crime scene reconstructionist.
20 (Doc. 11, Exs. H, J) After review, the Superior Court summarily dismissed his First PCR
21 after finding that Phillips had not met his burden under *Strickland v. Washington*, 466
22 U.S. 668 (1984), because he had “merely [stated] conclusions, assertions, or speculation
23 which fails to present a sufficient issue of material fact to warrant an evidentiary
24 hearing.” (Doc. 11, Ex. J, at 1)

25 Phillips timely petitioned the Arizona Court of Appeals for review alleging that
26 the Superior Court abused its discretion in denying his First PCR. (Doc. 11, Ex. K) At
27 the conclusion of briefing, the Court of Appeals ordered that review be denied. (Doc. 11,
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1 Exs. L, M) Phillips' petition to the Arizona Supreme Court for review was denied in
2 April 2008. (Doc. 11, Ex. N)

3 **C. Second Rule 32 Petition**

4 The record indicates Phillips did not file anything between April 2008 and January
5 2014, when he filed a *pro se* Petition for Post-Conviction Relief ("Second PCR") in
6 Coconino County Superior Court alleging that he had received ineffective assistance of
7 counsel and that the State had lacked evidence to support his first degree murder
8 conviction. (Doc. 11, Exs. P, JJ) In response, the State argued that Arizona Rules of
9 Criminal Procedure 32.2(a) and (b) preclude Phillips from raising the claims in his
10 Second PCR, because he had not raised the claims in his First PCR. (Doc. 11, Ex. R)
11 Phillips' reply argued that the State's response was untimely and that the untimely
12 response violated his constitutional right to Due Process. (Doc. 11, Ex. S) After
13 thorough analysis, the Superior Court summarily denied his Second PCR after concluding
14 that Phillips' Second PCR "failed to raise a colorable claim," and that his claims "failed
15 to present a material issue of law which would entitle [him] to relief." (Doc. 11, Ex. T, at
16 1)

17 Phillips then petitioned the Arizona Court of Appeals for review alleging that the
18 Superior Court abused its discretion in denying his Second PCR. (Doc. 11, Ex. U) The
19 Court of Appeals granted review but denied relief. (Doc. 11, Ex. V) Phillips filed a
20 motion for reconsideration which the Court of Appeals denied. (Doc. 11, Ex. W)
21 Phillips then petitioned the Arizona Supreme Court which denied review in May 2016.
22 (Doc. 11, Ex. X)

23 **D. Habeas Petition**

24 In May 2017, Phillips filed his Petition in this Court where he raises three claims
25 of ineffective assistance of counsel and one claim of vindictive prosecution. (Doc. 1 at 6-
26 9) In response, Respondents contend that his Petition is untimely and that he is not
27 entitled to equitable tolling, that several of the claims in his Petition are procedurally
28 defaulted, and that his guilty plea effectively waived most of his claims. (Doc. 11) In

1 reply, Phillips argues that he can overcome the “procedural bar” of the one-year period of
2 limitations for federal habeas petitions by showing ineffective assistance of trial counsel.
3 He also argues that it would be a miscarriage of justice for this Court to not consider
4 review of the claims in his Petition, that his Second PCR contained all of the claims in his
5 Petition, and that returning to state court would be futile. (Doc. 14)

6 **E. Analysis: Phillips’ Petition is Untimely**

7 A state prisoner seeking federal habeas relief from a state court conviction is
8 required to file the petition within one year of “the date on which the judgment became
9 final by the conclusion of direct review or the expiration of the time for seeking such
10 review.” 28 U.S.C. § 2244(d)(1)(A). The period of limitations is statutorily tolled during
11 the time in which a “properly filed application for State post-conviction or other
12 collateral review with respect to the pertinent judgment or claim is pending” in the State
13 courts. 28 U.S.C. § 2244(d)(2).

14 Phillips’ conviction became final when he was sentenced by the Coconino County
15 Superior Court in November 2005. The one year period under the statute would normally
16 begin running the following day; however, before his conviction became final, Phillips
17 filed a Notice of Post-Conviction Relief thereby tolling his period of limitations under
18 Section 2244(d)(2). *Isley v. Ariz. Dept. of Corrections*, 383 F.3d 1054, 1055-56 (9th Cir.
19 2004) (“The language and structure of the Arizona post-conviction rules demonstrate that
20 the proceedings begin with the filing of the Notice.”) Phillips’ tolling continued until the
21 conclusion of his post-conviction proceedings in April 2008 when the Arizona Supreme
22 Court denied review of his First PCR. *Hemmerle v. Schriro*, 495 F.3d 1069, 1077 (9th
23 Cir. 2007) (collateral proceedings conclude when the Arizona Supreme Court denied
24 petition for review). Phillips did not make any subsequent filings or have any
25 proceedings after the Arizona Supreme Court denied review in April 2008. Accordingly,
26 the one year statutory limitation imposed on federal habeas petitions began to run in April
27 2008, and Phillips was required to file his habeas petition in this Court by April 2009. He
28 did not and so the one year period expired. Once expired, it could not be revived by

1 subsequent filings. *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005) (no AEDPA tolling
2 from untimely state post-conviction petitions); *Ferguson v. Palmateer*, 321 F.3d 820, 823
3 (9th Cir. 2003) (“section 2244(d) does not permit the reinitiation of the limitations period
4 that has ended before the state petition was filed”).

5 Therefore, Phillips’ Petition is untimely unless he can show that he is entitled to
6 equitable tolling. To be entitled to such relief, Phillips must show: (1) that he has been
7 pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his
8 way. *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544
9 U.S. 408, 418 (2005)).

10 In his reply, Phillips does not explain why he actively litigated his case until April
11 2008 and then did not file anything for almost six years. (Doc. 11, Exs. H, K, P, U)
12 Instead, Phillips relies on *Evans v. Sec’y Pa. Dep’t of Corr.*, 645 F.3d 650 (3rd Cir. 2011),
13 *Jackson v. Shanks*, 143 F.3d 1313 (10th Cir. 1998), and *Murray v. Carrier*, 477 U.S. 478
14 (1986), to argue that he should be excused from the “time bar procedural default” due to
15 ineffective assistance of counsel. Phillips does not explain, and the Court cannot
16 understand, how these cases demonstrate that Phillips is entitled to equitable tolling.

17 Finally, Phillips argues that his trial counsel was ineffective and, as a result, this
18 requires “petitioner to be excused from the time bar procedural default.” (Doc. 14 at
19 11:12-13) However, this is not an extraordinary circumstance that would entitle Phillips
20 to equitable tolling.

21 **F. Pending Motions**

22 Phillips moved for an extension of time to file his reply. The Court will grant that
23 such that his reply will be considered timely. (Doc. 12)

24 Phillips also moved for additional documents and transcripts but does not explain
25 how these trial documents would assist his claim and the Court cannot see how any of
26 them would demonstrate his entitlement to equitable tolling. (Doc. 13) Accordingly,
27 Phillips’ request will be denied.

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1 **IT IS THEREFORE ORDERED** granting Phillips' Motion for Extension of
2 Time to File Reply. (Doc. 12)

3 **IT IS FURTHER ORDERED** denying Phillips' Motion for Documents and
4 Transcripts. (Doc. 13)

5 **IT IS THEREFORE RECOMMENDED** that Terrance Ardell Phillips' Petition
6 for Writ of Habeas Corpus be **denied and dismissed with prejudice**.

7 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and
8 leave to proceed *in forma pauperis* on appeal be **denied** because dismissal of the Petition
9 is justified by a plain procedural bar and jurists of reason would not find the ruling
10 debatable.

11 This recommendation is not an order that is immediately appealable to the Ninth
12 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules
13 of Appellate Procedure, should not be filed until entry of the district court's judgment.
14 The parties shall have fourteen days from the date of service of a copy of this
15 recommendation within which to file specific written objections with the Court. *See*, 28
16 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter,
17 the parties have fourteen days within which to file a response to the objections. Failure
18 timely to file objections to the Magistrate Judge's Report and Recommendation may
19 result in the acceptance of the Report and Recommendation by the district court without
20 further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).
21 Failure timely to file objections to any factual determinations of the Magistrate Judge will
22 be considered a waiver of a party's right to appellate review of the findings of fact in an
23 order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Rule
24 72, Federal Rules of Civil Procedure.

25 Dated this 2nd day of May, 2018.



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David K. Duncan
United States Magistrate Judge